Supreme Court, U.S.
FILED
MAY 22 2003
OFFICE OF THE CLERK

No. 02-1479

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS.

On Petition for a Writ of Certiorari to the Commonwealth of Massachusetts Appeals Court

REPLY BRIEF FOR THE PETITIONER

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

May 21, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONER 1
CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Acequia, Inc. v. *Clinton*, 34 F.3d 800 (CA9 1994).....3

Appletree Square I Ltd. P'ship v. *O'Connor & Hannan*, 575 N.W.2d 102 (Minn. 1998).....1, 3

Cohen v. *TIC Fin. Sys.*, 279 B.R. 145 (Bankr. D. Del. 2002) .2, 3

D&K Props. Crystal Lake v. *Mut. Life Ins. Co.*, 112 F.3d 257 (CA7 1997).....1

In re 1095 Comm. Ave. Corp., 204 B.R. 284 (Bankr. D. Mass. 1997), *aff'd*, 236 B.R. 530 (D. Mass. 1999).....2

In re Hooker Investments, Inc., 162 B.R. 426 (Bankr. S.D.N.Y. 1993).....3

Michigan v. *Long*, 463 U.S. 1032 (1983).....5

Peltz v. *Worldnet Corp.*, 280 B.R. 573 (Bankr. D. Del. 2002).....3

Terrebonne Fuel & Lube, Inc. v. *Placid Ref. Co.*, 666 So. 2d 624 (La. 1996).....1, 3

Statutes

11 U.S.C. 1123(b).....5

11 U.S.C. 1123(b)(3).....4

Other Authorities

C. Wesley Vines & Vernon O. Teofan, *The Preservation and Prosecution of Avoidance Actions Post-Confirmation*, 12 BANKR. DEV. J. 735 (1996).....2

Cert. Reply Br. for the Petitioner, No. 01-1500 *Clay* v. *United States* 6-7, *cert. granted*, 536 U.S. 957 (2002).....5

REPLY BRIEF FOR THE PETITIONER

The petition for certiorari demonstrated that this case squarely presents an entrenched, recurring, and important conflict among the circuits and state supreme courts over the validity of "reservation clauses" in bankruptcy confirmation orders. The clause in this case provided, in terms widely employed in confirmation orders, that petitioner "may retain and * * * settle, release or prosecute, [the] alleged claims against [respondent] arising from the transactions between [petitioner] and [respondent] and related matters." The court of appeals, adopting the Seventh Circuit's rule, held that such a general reservation is "too broad and vague to prevent the Confirmation Order from constituting *res judicata*." Pet. App. 26a (citing *D&K Props. Crystal Lake* v. *Mut. Life Ins. Co.*, 112 F.3d 257 (CA7 1997)). Other circuits and state supreme courts would have reached the opposite result, because the reservation clause provided that the "claims of the estate would be preserved" (*Appletree Square I Ltd. P'ship* v. *O'Connor & Hannan*, 575 N.W.2d 102, 104-05 (Minn. 1998)) or because petitioner was *at least* entitled to prove that "the parties and the court were aware that these claims would be asserted later" (*Terrebonne Fuel & Lube, Inc.* v. *Placid Ref. Co.*, 666 So. 2d 624, 634-35 (La. 1996)). Respondent importantly does not dispute that the issue can arise in almost any substantial bankruptcy, for it is frequently necessary to reserve the debtor's right to pursue claims later in order to speed the confirmation process. See Pet. 12.

The brief in opposition offers no substantial reason to deny certiorari. Most of it is consumed by respondent's self-serving twist on the facts that not only has nothing to do with whether review is warranted, but that is furthermore inaccurate and unsupported by the record. Petitioner will therefore not respond, other than to note that respondent ought not attempt to cast aspersions, having been sanctioned with its counsel to the tune of $200,000 for attempting to defraud the bankruptcy court in this case. *In re 1095 Comm.*

Ave. Corp., 204 B.R. 284 (Bankr. D. Mass. 1997), *aff'd*, 236 B.R. 530 (D. Mass. 1999). In the entire opposition, respondent musters a single, inexplicable argument for why this case is supposedly not an appropriate vehicle to resolve the circuit split: as even respondent concedes, neither the trial court nor the court of appeals dismissed the claims at issue on the state law grounds respondent now asserts were "adequate and independent." Respondent's further suggestion (never clearly stated or advanced as a reason for denying review) that the reservation clause in this case does not encompass the claims that petitioner argues were preserved – because, respondent contends, the "alleged claims" reserved by the clause include only claims that petitioner had already filed in court as of the date of confirmation – was rejected by the lower courts and respondent offers no basis for overturning their determination. Certiorari accordingly should be granted.

1. The conflict among the circuits and state supreme courts over whether general reservation clauses in bankruptcy confirmation orders are effective is recognized by both the courts and commentators. See Pet. 13 (quoting *Cohen* v. *TIC Fin. Sys.*, 279 B.R. 145 (Bankr. D. Del. 2002); C. Wesley Vines & Vernon O. Teofan, *The Preservation and Prosecution of Avoidance Actions Post-Confirmation*, 12 BANKR. DEV. J. 735 (1996)). The petition demonstrated the three-way split between courts that (i) *per se* refuse to enforce such clauses (the rule adopted below) (Pet. 14); (ii) enforce those clauses to the extent the parties were aware of the claims in question (*id.* 15); and (iii) *per se* enforce such clauses without regard to the circumstances (*id.* 16). The judgment in this case would be reversed under either of the latter two rules, at the very least because petitioner has not yet had the opportunity to establish that respondent was aware of the claims in question (and the evidence is overwhelming that it was).

Respondent addresses the critical issue of the conflict demonstrated by the petition in only two paragraphs, no doubt

because there is little that can be said against it. Respondent contends that the rule applied in this case is essentially the same as applied in a decade-old bankruptcy court decision (*In re Hooker Investments, Inc.*, 162 B.R. 426 (Bankr. S.D.N.Y. 1993)), which according to respondent holds that if the debtor "identifies his claims in his schedules, and references the schedules in the reservation clause, then the reservation clause preserves those claims." BIO 26. The petition never cited *Hooker* and respondent never explains why it thinks that decision, rather than those that conflict with the ruling below, is relevant. The cases cited by the petition do not involve a circumstance in which a confirmation order is held to import a claim referenced on a bankruptcy schedule, and respondent does not contend otherwise. In *Terrebonne Fuel*, for example, the claim was deemed preserved despite that it "was not included in the bankruptcy schedules nor was it disclosed in [the debtor's] Plan of Reorganization." 666 So. 2d at 628.

Respondent's only other argument addresses two bankruptcy court decisions correctly cited by the petition as adopting the *per se* rule that general reservation clauses are valid. BIO 26. Respondent ignores the other four decisions cited by the petition as adopting the same rule, including decisions of the Ninth Circuit (*Acequia, Inc.* v. *Clinton*, 34 F.3d 800 (1994)) and Minnesota Supreme Court (*Appletree Square*, *supra*). But in any event, respondent errs (BIO 27) in characterizing the discussion of the reservation clauses in the two bankruptcy court cases as "dictum" and alternatively "limited * * * to preference actions." Recognizing the square conflict over the enforceability of general reservation clauses, and adopting the view of numerous decisions that did not involve "preference actions," the court rejected at length the argument that "a reservation must specifically disclose the proposed subsequent action against the particular defendant." *Cohen* v. *TIC Fin. Sys.*, 279 B.R. 145, 156 (Bankr. D. Del. 2002). See also *Peltz* v. *Worldnet Corp.*, 280 B.R. 573, 589-94 (Bankr. D. Del. 2002).

Respondent's lengthier argument on the merits – quoting decisions on its side of the conflict – only highlights that the question presented is substantial and heavily debated, *i.e.*, that it merits review in this Court. But in any event, petitioner has the better of the argument. A prohibition on general reservation clauses fails to accommodate either the fact that debtors frequently will not know with certainty at the time of plan confirmation what claims are available to them or the need to move to the confirmation promptly. But in any event, when (as is alleged in this case) the debtor *is* aware of the claims, it has no reason to complain and respondent's assertions of disruption to the bankruptcy process (BIO 20) are imagined. If a creditor has a meritorious objection that a reservation clause is too broad, it can object to the bankruptcy court prior to confirmation. Here, by contrast, it was respondent that drafted the clause in the first place.

2. Unable to muster any substantial answer to the conflict presented by the petition, respondent offers a single argument for why this case is supposedly an inappropriate vehicle to decide the issue: that "the decision below rests on separate, adequate and independent state grounds." BIO 13-18. But that argument is so obviously lacking in merit that it does not require any extended discussion. The trial court and the court of appeals held that the claims now at issue – those added by petitioner's post-confirmation amendment to his counterclaim against respondent – were barred on the single ground raised by the petition: *res judicata* stemming from the bankruptcy confirmation. See Pet. App. 2a-5a (court of appeals); *id.* 22a-27a (trial court). Respondent does not contend otherwise. Respondent also admits that is an issue of federal law: "Quite naturally, res judicata principles in the bankruptcy arena are grounded first in general federal res judicata jurisprudence." BIO 18.[1]

---

[1] Not only is it therefore irrelevant that the lower courts did not cite 11 U.S.C. 1123(b)(3) by name (see BIO 18) but the decisions in

Respondent's vehicle argument is therefore doomed at the outset, for it concedes that the "state court decision [must] indicate[] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent state grounds" (*Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983) (alterations in BIO)), but in this case the "alternative state law grounds were *not* expressly articulated" with respect to the claims in question (BIO 13 (emphasis added)). Respondent's argument that this Court nonetheless lacks jurisdiction is difficult to understand, but seems to be that (i) the superior court found that a binding release applied to some of petitioner's claims (albeit not the claims at issue here); and (ii) the state courts would find that factual determination *res judicata* as to the claims now at issue "if the res judicata decision [regarding the reservation clause] were reversed" by this Court. BIO 14. The simple answer is that, with respect to the claims now at issue, the state courts *did not* rule against petitioner on the basis of the release but instead, as noted, concluded that the claims were barred by the confirmation order because the reservation clause was unenforceable. Thus, the ruling below not only did not "clearly and expressly" rely on state law grounds (*Michigan* v. *Long*, *supra*), it did not rely on those grounds at all. Respondent's argument amounts to no more than the self-serving assertion that it believes it can prevail on remand on an alternative basis, which is not a ground for denying certiorari. See, *e.g.*, Cert. Reply Br. for the Petitioner, No. 01-1500 *Clay* v. *United States* 6-7, *cert. granted*, 536 U.S. 957 (2002).

3. Respondent similarly errs in suggesting that the reservation clause in this case by its terms did not encompass the claims petitioner contends were preserved. The clause provides that petitioner "may retain and * * * settle, release or prosecute, [the] alleged claims against [respondent] arising

---

any event resolved the meaning of that statute, given that the cases cited by the lower courts and the parties all involve the application of Section 1123(b).

from the transactions between [petitioner] and [respondent] and related matters." Petitioner contends that the clause preserved the counterclaims against respondent in state court that were added after the bankruptcy court entered the confirmation order. Respondent, by contrast, contends that the only "alleged claims" at the time of confirmation were those already on file. But "alleged claims" is not the same thing as "filed claims." The bankruptcy court furthermore approved petitioner's retention of counsel for the filed counterclaim "or any *future action* filed against Citizens." Ct. App. Appx. 2307-2308. The state courts accordingly did not accept respondent's construction of the clause. Rather, they obviously believed that the clause applied by its terms to more than the two pre-confirmation counterclaims, for that is the reason that they refused to enforce it as "too broad and vague." Pet. App. 26a.[2]

Nor is there merit to respondent's contention that petitioner did not make clear in the bankruptcy that he intended to pursue anything other than his two initial counterclaims. It is not possible to tell whether respondent believes this assertion (i) informs the meaning of the clause, or instead (ii) indicates that petitioner would not prevail under the intermediate rule (see *supra* at 2-3) that a general reservation clause is enforceable if the parties are aware of the claims to be preserved. If the former, the answer is that (as explained in the previous paragraph) the lower courts properly rejected the argument that the clause by its terms excluded any later-filed counterclaims. If the latter, the answer is that, because the lower courts applied a *per se* rule

---

[2] Respondent also notes that its impaired claim was "allowed." But it was "allowed" only "until and unless reduced by Final Order to a judgment against Citizens." Pet. App. 24a. Not even respondent contends that the "allowed" nature of its impaired claim serves to preclude counterclaims, given that it has always conceded that the two counterclaims filed prior to the confirmation order were not barred by *res judicata*.

against enforcing general reservation clauses, petitioner had never had the opportunity to make a factual showing that respondent was aware of his claims at the time of confirmation. Respondent is thus not relying on factual findings, but on the evidence it would invoke on remand should this Court adopt the intermediate standard. Once again, the prospect that respondent might prevail on remand (here, on a factual issue) is not a ground for denying certiorari with respect to the purely legal question presented.

Furthermore, the evidence is overwhelming that respondent was fully aware at the time of confirmation of the potential claims that would be filed against it. As noted, the bankruptcy court approved petitioner's retention of counsel to bring further claims. Further, prior to confirmation, respondent filed in the bankruptcy court a disclosure statement acknowledging that "Mr. Bishay believes that Citizens has acted in bad faith, improperly and overly aggressively in several respects in connection with the enforcement of its rights as a creditor, which has resulted in harm which Mr. Bishay believes may exceed $100,000,000." As respondent admits, both the description of the claims, and their amount, refer to the future, potential counterclaims that petitioner had warned respondent that he was considering filing. See BIO 21 ("What was also not identified [in the pre-confirmation counterclaims] was an alleged $100 million of damages allegedly arising out of Citizens' efforts to collect a concededly owed $2.5 million debt."). Respondent's contrary reliance on statements by petitioner's counsel at a hearing before the bankruptcy court is misleading. Those statements simply compared the scope of the existing counterclaims to other litigation; there is no support for the assertion (BIO 11) that "Bishay's own lawyer disavowed any claims against Citizens other than the two discrete claims set forth in his pending counterclaim." Just as important, respondent's counsel successfully argued to the contrary (in securing an extraordinary order from the bankruptcy court requiring petitioner to post $500,000 to cover potential litigation costs

if he lost) that petitioner's claims were substantially more extensive than those he had filed as of that date. See Ct. App. Appx. 3046 (respondent's counsel: "Mr. Bishay's claims against the bank are extremely wide-ranging, and * * * Mr. Bishay believes that the damages that he is entitled to recover exceed one hundred million dollars").

There is accordingly no merit to respondent's contention that this case does not present the important, entrenched, and frequently recurring conflict among the circuits and state supreme courts over the validity of general reservation clauses in plans of reorganization.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

May 21, 2003